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In the Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 641 and 642

THE GLIDDEN COMPANY AND UNITED STATES GUARANTEE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (No. 641, R. 122–126, 128–129, 142; No. 642, R. 62–72, 68–69, 76)[1] are not reported. The opinion of the Circuit Court of Appeals (No. 641, R. 152–167; No. 642, R. 86–101) is reported at 119 F. (2d) 235.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on April 18, 1941. (No. 641, R. 151; No. 642, R. 85.) Applications for rehearing were

[1] The cases were heard and decided together and the opinions are the same in both.

filed on May 17, 1941 (No. 641, R. 169; No. 642, R. 103) and were denied June 25, 1941 (No. 641, R. 179; No. 642, R. 113). The petitions for writs of certiorari were filed on September 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an adjudication that the diversion tax of $6.40 upon each proof gallon of alcohol illegally diverted was a penalty and its enforcement barred by the prior jeopardy of the taxpayer is *res judicata* of suits by the United States to recover upon bonds given to secure the revenue and obligating the taxpayer and its surety to pay for each gallon diverted at specified rates less than the diversion tax but greater than the basic tax.

2. Whether the Commissioner of Internal Revenue was authorized to issue regulations requiring the execution of the bonds as a condition to obtaining permits to obtain denatured alcohol tax-free, and, if not, whether recovery upon the bonds is precluded for that reason.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 11–16.

STATEMENT

These are suits brought by the United States to recover upon bonds given as a condition to the is-

suance to the principal, The Glidden Company, one of the petitioners herein, of permits for the industrial use of specially denatured alcohol. No. 641 is brought upon two bonds in the respective amounts of $100,000 and $50,000; No. 642 upon one bond in the amount of $70,000. The petitioner United States Guarantee Company is the surety on each of the bonds. The district court granted the petitioners' motions for judgments on the pleadings (No. 641, R. 143; No. 642, R. 77). Upon appeal to the court below the judgments were reversed and the causes remanded for further proceedings consistent with the opinion (No. 641, R. 151; No. 642, R. 85).

The pleadings in both cases are substantially similar and the cases may be treated together. The second amended petitions (No. 641, R. 8–48; No. 642, R. 8–29) filed by the United States allege, in substance, that in 1927, 1928 and 1929 The Glidden Company illegally diverted, for beverage purposes, specified large quantities of denatured alcohol which it had withdrawn tax-free for manufacturing purposes under permits issued to it pursuant to the National Prohibition Act (c. 85, 41 Stat. 305); and that by such illegal diversions and various other acts it violated the condition of the bonds which it and the United States Guarantee Company had executed to the United States in order to secure the permits.

The condition of the bonds for $100,000 and $70,000, respectively, as admitted in petitioners' answers (No. 641, R. 95; No. 642, R. 47), is in the form (Form 1480) specified by Treasury Regulations 61 (Art. 110, Appendix, *infra*, pp. 14–15) and is as follows (No. 641, R. 12; No. 642, R. 12):

> NOW, THEREFORE, the condition of this obligation is such that if there be no material false statement in the application for such permit, and the said principal shall not violate the terms of such permit, and shall transport, store, and use such denatured alcohol in accordance with the law and regulations made pursuant thereto, and shall in all respects fully and faithfully comply with all provisions of law now or hereafter enacted and all regulations promulgated thereunder respecting such transportation, storage, and use, and shall pay for all such denatured alcohol illegally or unlawfully diverted, lost, or unaccounted for in violation of such permit and law and regulations at the rate of $4.50 per wine gallon, and in addition thereto shall pay all penalties and fines imposed, then this obligation to be void; otherwise to remain in full force and virtue.

The condition of the bond for $50,000 (No. 641, R. 26) is identical except that, having been executed later than the other bonds, it provides for a rate of $2, instead of $4.50, per wine gallon in conformity with Form 1480 as amended by

Treasury Regulations 3 (Revised August, 1927, Art. 112, Appendix, *infra,* pp. 15–16).

With respect to each bond the petitions allege two counts, each, in the alternative, seeking recovery in the full amount of the bond. One count alleges that by reason of the unlawful diversions and other violations of the bond the United States suffered damages amounting to more than the amount of the respective bonds in that it lost the basic tax imposed by Section 600 of the Revenue Act of 1918, as amended (Appendix, *infra,* pp. 11–12), of $1.65 per proof gallon in the case of the $100,000 and $70,000 bonds (No. 641, R. 21–22; No. 641, R. 24), and $1.10 per proof gallon in the case of the $50,000 bond (No. 641, R. 44). The other count alleges that by reason of the violations of the bond and of the petitioners' failure to pay the United States in accordance with the provisions of the bond, the United States suffered damages at the rate of $4.50 per wine gallon in the case of the first two bonds (No. 641, R. 24–25; No. 642, R. 29), and at the rate of $2 per wine gallon in the case of the $50,000 bond (No. 641, R. 47–48).

The answers filed by the petitioners deny any unlawful diversions or other violations of the bonds, and allege several affirmative defenses to the counts on each of the bonds (No. 641, R. 95–119; No. 642, R. 47–61). The second and fourth of these defenses are invoked in the petition herein (p. 5)

and will be dealt with in the Argument. Demurrers to the affirmative defenses were overruled by the district court (No. 641, R. 126; No. 642, R. 67). Thereafter the United States replied to the defenses (No. 641, R. 130–140; No. 642, R. 70–74) and the cases were decided, as aforesaid, upon the petitioners' motions for judgments on the pleadings.

ARGUMENT

1. The second of the defenses alleged in petitioners' answers and the principal contention made in the petition herein is, in substance, that the actions are barred by the judgment in *United States* v. *Glidden Company*, 78 F. (2d) 639, certiorari denied 296 U. S. 652. That was a suit by the United States against the Glidden Company and another to recover, not upon the bonds, but the tax of $6.40 per proof gallon on each gallon diverted for beverage purposes imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended by the Revenue Act of 1926 (Appendix, *infra*, pp. 11–12). The defendants filed an answer alleging, *inter alia*, that the tax sought to be collected was a penalty and that therefore, under the double jeopardy clause and the Willis Campbell Act (42 Stat. 222), the suit was barred by the prior indictment, conviction, and punishment of The Glidden Company for conspiring with others to commit the same illegal diversions as those involved in the tax suit. The Gov-

ernment's demurrer to this and other affirmative defenses was overruled by the district court (8 F. Supp. 177). The Government having rested upon its demurrer (78 F. (2d) 639, 640), a judgment was entered for the defendants and, on appeal, was affirmed by the court below, the court considering only the defense of double jeopardy and holding that it was valid.

The petitioners contend (Pet. 6–8) that The Glidden Company's exoneration from the diversion "penalties" of $6.40 per proof gallon is *res judicata* of the instant suits for the reasons that the bonds are indemnity bonds under which the United States is entitled to recover only actual damages suffered by it and that the only such damages suffered by it were the loss of the aforesaid "penalties." However, the court below held and it is well settled that the bonds were designed to secure the collection of the basic tax, as well as the collection of other revenues, and that they are enforcible as contracts notwithstanding that the principal is not subject to the basic tax because not a distiller or importer and, indeed, notwithstanding that collection of the tax is barred by the statute of limitations or some other obstacle. *United States* v. *Bornn*, 104 F. (2d) 641 (C. C. A.

[2] The petitioners (Pet. 6–7) seek to distinguish the decision in the *Bornn* case, *supra*, on the ground that the bonds there were executed and breached prior to the Revenue Act of 1926 when the diverter was subject to no liability for taxes or penalties. However, the bonds were in the same form

2),[2] certiorari denied *sub. nom. Bornn* v. *United States* and *Royal Indemnity Co.* v. *United States*, 308 U. S. 606; *United States* v. *Frost*, 80 F. (2d) 341 (C. C. A. 5); *United States* v. *Stein*, 119 F. (2d) 677, 679 (C. C. A. 3), certiorari denied, No. 524, present Term; *United States* v. *Van Schaack Bros. Chemical Works*, 33 F. Supp. 822 (D. C. N. D. Ill.). See *United States* v. *John Barth Co.*, 279 U. S. 370, 375; *Gulf States Steel Co.* v. *United States*, 287 U. S. 32.

The foregoing decisions likewise establish that the rate of $4.50 or $2 per wine gallon specified in the bonds is reasonable and does not render the bonds penal.[3] Hence it is clear that no question of double jeopardy is presented. *Helvering* v. *Mitchell*, 303 U. S. 391.

(Form 1480) as those here involved and the opinion contains no intimation that the bonds would have been construed differently if the principal had been otherwise liable. In the *Stein* and *Van Schaak Bros.* cases, *supra*, the *Bornn* case was followed though the bonds were executed and violated subsequent to 1926.

In *United States* v. *Zerbey*, 271 U. S. 332, cited by petitioners (Pet. 5, 6, 7, 8), the bond was a general compliance bond which, unlike those here, specified no definite rate of liquidated damages. Hence that case is inapplicable. See *Clark* v. *Barnard*, 108 U. S. 436; *United States* v. *Dieckerhoff*, 202 U. S. 302.

[3] One wine gallon of specially denatured alcohol of the formula here involved equals approximately 1.90 proof gallons. Accordingly, the rates specified in the bonds were slightly higher than the basic tax rates applicable during the corresponding periods, but lower than the diversion tax or penalty rate of $6.40 per proof gallon.

2. The fourth defense alleged in petitioners' answers, also invoked herein, is that the Commissioner had no authority to issue the regulations requiring the bonds because the bonds imposed a penalty of $4.50 or $2.00 per wine gallon in addition to the $6.40 per proof gallon penalty imposed by statute. We may pass the question whether this contention, even if sound, would defeat a recovery. Cf. *United States* v. *Bornn, supra,* 646. For, as already shown, the bonds were remedial, not punitive. Moreover, since the statutory tax or penalty was not collected, there is no occasion to consider whether, if it had been, the stipulation of the bonds could be enforced. The National Prohibition Act (Tit. II, Sec. 6, Tit. III, Sec. 13, Appendix, *infra,* pp. 12–13) authorized the Commissioner to issue regulations requiring bonds, as did the Denatured Alcohol Act of 1906 (Appendix, *infra,* pp. 13–14), and the form here involved has been approved by the courts "as if Congress had itself determined" it. *United States* v. *Bornn, supra,* 646; and other cases, *supra.*

CONCLUSION

The cases were correctly decided by the Circuit Court of Appeals and no conflict or question of general importance is presented. Moreover, contrary to petitioners' assertion (Pet. 9), these are not the first cases to reach this Court involving the enforcement of the stipulation contained in

Form 1480 bonds given subsequent to the Revenue Act of 1926, since the bond in *Stein* v. *United States, supra,* was of the same character. The petition for writs of certiorari therefore should be denied.

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